

that in a large number of LMA situations, the licensee could have found another buyer, thereby maintaining the same number of voices.

The importance of tight, effective attribution of same market LMAs is also magnified in light of the recent and ongoing relaxation of broadcast ownership rules, as noted above, at 9. Finally, and perhaps most important, these licensees many times present the best, most affordable avenue for entry by minority and female owners. See MAP, *et al.* Duopoly Comments at 20. Therefore, allowing licensees to enter into LMAs works against the Commission's longstanding goals of promoting equal opportunity in broadcasting.

LMAs should also be attributed for purposes of the national audience reach cap. Again starting from the observation that LMAs give the holder editorial control, the Commission must recognize that LMAs held by a group owner increase the number of viewers nationwide that the owner reaches.

#### **IV. INCREASING THE VOTING STOCK BENCHMARKS WOULD RISK SIGNIFICANT REDUCTION IN VIEWPOINT DIVERSITY AND HAS NOT BEEN SHOWN TO PRODUCE ECONOMIC BENEFITS.**

The Commission has requested comment on whether to increase the percentages of voting stock that parties may hold in a licensee without triggering attribution from 5 to 10 percent for active investors and from 10 to 20 percent for passive investors. This proposal dates back to the *Capital Formation Notice*, released in 1992 and incorporated into the 1994 *NOPR*. 7 FCCRcd 2654 (1992). In the *FNOPR* the Commission renews the call for empirical evidence to support this tentative conclusion, and invites comment on a study conducted by Commission staff. *Id.* at ¶37.

With this proposal, the Commission risks allowing a significant reduction in editorial

diversity in exchange for unproven, and possibly negligible benefits. The risks to editorial diversity from allowing up to 10% voting stock holdings are readily apparent. Indeed, it strains credibility to think that an investor could hold a 9.9% interest in the voting stock of a licensee and *not* have a significant degree of influence over editorial decisions.

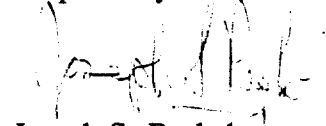
Indeed, the Commission has determined this itself, holding in the *1984 Attribution Order* that adoption of a benchmark higher than 5% might "result in many substantial and influential interests being overlooked." *1984 Attribution Order*, 97 FCC2d at 1006. Just eight years later, in the *Capital Formation Notice*, the Commission abandoned this holding, speculating that the economic and competitive conditions had changed and inviting commenters to provide evidence to confirm this conclusion. It discovered by the time of the *1994 NOPR* that, although the majority of commenters supported raising the voting stock benchmarks, none of them could produce "specific, empirical evidence" in support of their position. *FNOPR* at ¶36. Specifically, none of those commenters could explain the changes in the economic marketplace that would justify raising the benchmark, nor could they verify the link between raising the benchmark and producing more capital investment. *1994 NOPR* at 3617.

Today, over two years later, they still have not and still cannot. Once again, at a minimum, the Commission should not act to increase the existing voting stock benchmarks unless parties supporting the increase provide evidence that it would not risk nonattribution of influential interests. Similarly, it should require proof that there would be significant benefits from the increase. To date, no parties supporting the increase have produced evidence that it would stimulate investment, and in any event, as Commenters have noted above, the need to encourage investment is already vastly overestimated.

## CONCLUSION

The attribution rules are the crucial keystone supporting the entire structure of the Commission's ownership rules. Yet in their current state, they have been singularly open to exploitation. For that reason, the Commission should adopt the Equity or Debt Plus proposal, should attribute LMAs, and should not raise its current thresholds for attribution of voting stock.

Respectfully Submitted,



Joseph S. Paykel



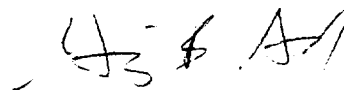
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## **APPENDIX A**

eral of the issues common to each of these dockets.<sup>1</sup> In particular, MAP, *et al.* will address erroneous assumptions the Commission has made about the nature of the marketplace of ideas and the likelihood of an increasingly concentrated broadcast industry to contribute to diversity in that marketplace of ideas.

**INTRODUCTORY STATEMENT-  
LOCAL/NATIONAL, MULTIPLE/CROSS, TV/RADIO/NEWSPAPER,  
AND ATTRIBUTION OF OWNERSHIP QUESTIONS ARE  
INTERDEPENDENT AND MUST BE CONSIDERED AS A WHOLE**

Much of the discussion immediately following applies not just to local television duopolies, but more broadly to the general issue of concentration of control in the mass media. The Commission's decision to consider revisions of each of its broadcast ownership rules separately significantly complicates preparation of a coherent response. It requires parties to afford *à la carte* treatment to four overlapping dockets incorporating the records of about a dozen different solicitations for comments, and submissions responding thereto. The approach tends to compartmentalize broadly based objections to increased concentration of control and undermine those who would seek to oppose further repeal or relaxation of the FCC's various ownership rules.<sup>2</sup> More importantly, it interferes with the Commission's ability to engage in rational decisionmaking.

For example, in revising radio-television cross-ownership standards, the Commission asks whether these strictures can even be eliminated altogether, on the basis that radio and television

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<sup>1</sup>*Further Notice of Proposed Rulemaking*, FCC No.96-436 (released November 7, 1996) (*Attribution Notice*); *Notice of Inquiry*, FCC No. 96-197 (released October 1, 1996) (*Newspaper/Radio Cross-Ownership Notice*); *Notice of Proposed Rulemaking*, FCC No. 96-437 (released November 7, 1996) (*National TV Rules Notice*); *Second Further Notice of Proposed Rulemaking*, FCC No. 96-438 (released November 7, 1996) (*Second Further NOPR*).

<sup>2</sup>The Commission does ask about the "aggregate effect these proposed rules may have on small stations, or stations owned by minorities." *TV Ownership FNOPR* at ¶19. However, it does not pose the same question as to their effect on the *public* in general, or *viewers* in particular.

ownership rules alone might ensure sufficient diversity and competition in a local market. (See *Second FNOPR* at ¶64). At the same time, however, the Commission has also asked whether it should permit local TV duopolies, undercutting the very protections on which it elsewhere relies. *Id.*, ¶¶ 13, 29.

The Commission has framed the issues in this debate not in terms of whether the current scheme is serving the public interest, but only as to how many of its rules it should repeal or relax. With the notably laudable exception of its proposal to establish meaningful definitions of what is "attributable" ownership, even where it alludes to doubts that current conditions would justify further deregulation, the Commission does not propose better or more effective regulation.

**The Commission Has Not Had Time to Assess the  
Impact of Changes Which Have Already Transpired**

What is most startling about the current state of the record before the FCC is that the Commission has proposed to proceed in this direction before it is possible to assess the effect of the recent and dramatic changes in broadcast ownership in this country.<sup>3</sup> The unprecedented

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<sup>3</sup>According to the Commission, the it lacks data on, *inter alia*, the following: (1) the current number of minority and women owned broadcast properties; (2) the number of small businesses impacted by the local television broadcast ownership proceeding; (3) the number of entities that may seek to obtain a TV or radio license (see *TV Ownership Second FNOPR* at p. 47); (4) the specific public interest benefits that may result from relaxation of the duopoly rule; (5) quantitative estimates of the efficiencies that may result from greater ownership concentration in local broadcasting so as to weight these benefits against the potential harm of such concentration to competition and diversity (See *TV Ownership Second FNOPR* at ¶31); (6) identification and elimination of market entry barriers for small businesses, *Notice of Inquiry* in GN Docket No. 96-113 (In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses), FCC 96-216, released May 21, 1996; (7) the ability of small broadcasters to raise capital, *Capital Formation Notice*, 7 FCCRcd 2654 (1992) (See *Attribution NPRM* at pp. 26-7 n. 76); (8) the number of and location of TV LMAs and the duration and other terms of these contracts, see *TV Ownership Second FNPRM* at ¶87). While comments may adduce some of this information, much of it can only be obtained by broad based information collection proceedings only the Commission (or Congress) could conduct.

restructuring of ownership and in the nature of the business,<sup>4</sup> has even engendered widespread public dissatisfaction and anxiety among large numbers of broadcasters.<sup>5</sup> Many of those broadcasters which have responsibly accepted their trusteeships imposed under the Communications Act, now fear that they will be squeezed out by a new breed of broadcaster that is ready to accept the benefits of a free license to use public spectrum, but unwilling to acknowledge the obligations that accompany this privilege.

Given the dearth of substantive information in the record - and in particular, the market entry barriers faced by minorities and women,<sup>6</sup> and even the number,<sup>7</sup> much less the impact,

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<sup>4</sup>See also, *Special Report: 1995 \$ 8 Billion Station Trading Boom is Only the Beginning, Broadcasting and Cable*, March 11, 1995: total dollars spent on TV and radio stations nearly doubled in 1995 over 1994 (page 40); all forms of broadcast TV revenue (including advertising) rose 3% in 1995 to \$27.9 billion (page 41); radio industry saw a solid 7% gain in local and national revenue (page 42). In addition, see *Trading Market Explodes, Broadcasting and Cable*, Feb. 3, 1997, page 19, comparison of station trades (by dollar volume and number of sales) between 1995 and 1996 as follows:

	1996		1995	
TV	\$10,488,000,000	99 sales	\$4,740,000,000	112 sales
Combos	\$12,034,000,000	345 sales	\$2,790,000,000	213 sales
FM	\$2,628,000,000	417 sales	\$685,680,000	329 sales
AM	\$212,020,000	254 sales	\$106,760,000	195 sales
Totals	\$25,362,000,000	1,115 sales	\$8,320,000,000	849 sales

<sup>5</sup>"A lot of good broadcasters decided they didn't want to play under the new order and left the industry,' said longtime industry observer Jim Duncan, present of Duncan's American Radio." David Hatch, "Telecom law fails the test: Critics," *Electronic Media*, February 3, 1997, p. 1

<sup>6</sup>The Commission has only enough information to say that "We recognize that the numbers of minority and women broadcast owners may have changed due to an increase in license transfers and assignments since the passage of the 1996 [Telecommunications] Act." *Attribution Notice* at p. 29.

<sup>7</sup>"How many LMAs exist is unclear because stations are not required to report them to the FCC." Doug Halonen, "Duopoly rule faces challenge; NAB board divided," *Electronic Media*, February 3, 1997, at 29.

of LMAs - and in light of the transformations in media ownership concentration since passage of the 1996 Telecommunications Act - it is imperative that the Commission suspend its review of comments and first conduct a qualitative assessment of the present state of viewpoint diversity before taking any action on proposals to relax the duopoly rule. For the same reasons, the Commission should also suspend its interim duopoly waiver policy.

The imminent move towards digital television significantly exacerbates the conflict. Those who hold licenses today may soon be multi-channel providers, with vastly increased opportunity to influence public opinion or to exploit this public resource for private gain. To be sure, there are many, many broadcasters committed to serve to their communities in the public interest as a trade-off for a license. However, there are too many others whose strategy is to do as little as is necessary to retain their right to hold and exploit spectrum for personal advantage. Among those leading the charge is Lowell Paxson, CEO of Paxson Communications Corporation. Addressing the Association of Local Television Stations recently, Mr. Paxson said his goal is to control airwaves, not market share. "It's all about spectrum," he explained. Amazingly, Mr. Paxson analogized himself to a farmer extracting maximum revenue from his land by first operating a golf driving range and then selling the land when developers have increased market value. At last count, he held 45 full power and 14 low power stations in 37 markets, including 22 of the 30 largest, which are primarily devoted to carriage of direct marketing "infomercials." He was explicit in telling the group that the "big pay-off" was in the years to come when spectrum is revalued by the advent of digital technology. Chris Stern, "Broadcast Exes Urge Loose Regs," *Daily Variety*, January 14, 1997, at 14.

It is indefensible for the Commission to insist on proceeding without awaiting to see the



impact of regulatory changes which have already been made. Blindness to what the Commission is tacitly permitting will expand the cadre of licensees who, like Lowry Mays, Clear Channel's CEO, unabashedly reverse the statutory principle that broadcasters who agree to provide service as trustees for the public are then allowed to sell some commercial time. ("So Mays likes to say that his company is less in the in the broadcasting business and more in the business of selling Fords." Elizabeth A. Rathbun, "Clear Channel builds a broadcast dynasty: 'Lowry Mays & Sons' just keeps getting bigger," *Broadcasting and Cable*, October 7, 1996 at 56).

### **The Commission Has Underestimated the Economic Health of the Broadcasting Industry**

Broadcasting remains the dominant mass medium, with strong prospects for the future. Its transition to digital technologies, with cable carriage, seems assured. Other competing media, including the Internet and other "new media," are incapable of matching broadcasting's unique capability of delivering video advertising to essentially every American household. Broadcasting is, and is likely to remain, uniquely powerful.

Notwithstanding the industry's rosy outlook, the Commission's policy planning is rooted in a very pessimistic set of assumptions which have already been disproved. Ownership proposals now under review were first promulgated in similar form in 1992. *TV Ownership NOPR*, 7 FCCRcd 4111 (1992). The framework the Commission employed at the time still appears to govern the agency's analysis, *i.e.*, that "these rules needed to be amended in order to strengthen the potential of over-the-air television to compete in the current video marketplace and enhance its ability to bring increased choice to consumers." *TV Ownership FNOPR*, 10 FCCRcd 3524, 3529 (1995).

The premise that free, over-the-air television is in jeopardy traces to the issuance in 1991

of the widely disputed, and subsequently discredited, *Office of Plans and Policy Working Paper # 26, Broadcast Television in A Multichannel Marketplace*, 6 FCCRcd 3996 (1991) ("*OPP Report*"). The bleak future prognosticated by the *OPP Report* contemplated rapidly increasing dominance of new competition to "traditional" broadcast services from cable and video dialtone services. OPP's view was that this would soon impair broadcasters' "ability to contribute to a diverse and competitive video programming marketplace." See *TV Ownership FNOPR*, 10 FCCRcd 3524, 3529 (1995). And digital TV, now viewed as central to broadcasting's future viability, was treated not as a boon, but as a threat which "will benefit nonbroadcast media disproportionately,..." *OPP Report*, 6 FCCRcd at 4042.

Issued during a period of recession, and not contemplating the unprecedented health of the early 1990's economy as a whole, the *OPP Report* vastly underestimated the strength of broadcasting, and misperceived what now appears to be a bright future for a stable industry. The record in this proceeding contains numerous submissions documenting the substantive methodological flaws of the *OPP Report* which undermine its validity and usefulness in any FCC policy-making proceeding.<sup>8</sup> Moreover, the *OPP Report* did not anticipate several critical subsequent developments, most especially enactment of the 1992 Cable Act, with must-carry and retransmission consent provisions. Nor did its authors foresee the success of the Fox Network, and the emergence of two additional networks, thereby improving smaller TV stations' prime

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<sup>8</sup>Comments filed in this proceeding showed numerous methodological flaws in the *OPP Report*, including cost/benefit calculations which were made only of broadcast profitability and not of services to the public, and significant overstatement of cable's threat to broadcast networks by reliance on the number of cable homes passed (93.2%) rather than the actual number of subscribing households (58.9%). See, e.g., Reply Comments of Telecommunications Research and Action Center and Washington Area Citizens Coalition Interest in Viewers' Constitutional Rights in MM Docket No. 91-221.

time offerings and giving access to national advertising revenues.

**The Commission's Concern With Programming Diversity,  
As Opposed to Viewpoint Diversity, Is Misplaced**

None of the recent Congressional or FCC modifications to ownership regulation has changed the fundamental principle that the FCC is charged with maintaining a free flow of ideas. "Diversity of viewpoints is at the heart of the Commission's licensing responsibility." *Second Report and Order*, 50 FCC2d 1046, 1079, *recon.*, 53 FCC2d 589 (1975), *aff'd sub nom.*, *FCC v. NCCB*, 436 U.S. 775 (1978) (*Second Report and Order*).

The Commission must resist incessant efforts to redefine the diversity policy into oblivion. In particular, there is no legitimacy to claims that one owner controlling multiple program feeds in a locality can provide genuine diversity in the marketplace of ideas. "More programming" is not the same thing as "more diverse programming." "More channels" is not the same thing as "more separately controlled channels." The Commission's policies have properly sought to maximize the number of independently-owned local voices on the air,<sup>9</sup> and rejected the notion that it can simply trust monopolists not to abuse their power.<sup>10</sup> The greatest dangers arise at the local level; as the Supreme Court said, the Commission's local newspaper/broadcast cross-

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<sup>9</sup>For example, the Commission stated: "If a city has 60 different frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas would not be maximized. It might be the 51<sup>st</sup> licensee that would become the communication channel for a solution to a severe local crisis. No one can say that present licensees are broadcasting everything worthwhile that can be communicated." *Multiple Ownership of Standard, FM and TV Broadcast Stations*, 22 FCC2d 306, 311 (1970), *recon. granted in part*, 28 FCC2d 662 (1971).

<sup>10</sup>"Centralization of control over the media of mass communications is, like monopolization of economic power, *per se* undesirable. The power to control what the public hears and sees over the airwaves matters, whatever the degree of self-restraint which may withhold its arbitrary use." *First Report and Order in Docket 18110*, 22 FCC2d 306, 310 (1970), *recon. granted in part*, 28 FCC2d 662 (1971).

ownership rule, "was founded on the very same assumption that underpinned the diversification policy itself...that the greater the number of owners in a market, the greater the possibility of achieving diversity of program and service viewpoints." *FCC v. NCCB*, 436 U.S. at 814 (1978).<sup>11</sup>

The broadcast industry has pressed the Commission to agree that the mere multiplicity of program channels assures diversity even where there is no diversity in the ownership or control of that programming. But, as the Commission has said in its 1995 *TV Ownership NOPR*, "[w]hile this model may, indeed, promote diversity of entertainment formats and programs, we question whether it would act similarly with regard to news and public affairs programming." 10 FCCRcd at 3551.

MAP *et al.* urge the Commission to resist this dangerous idea. Their skepticism is borne out in evidence already in the record showing that increased concentration of ownership, brought about by changes in the national ownership limits in 1984 and relaxation of the duopoly rule in 1989, has reduced the quantity of, and viewpoint diversity in, local news and public affairs programming.<sup>12</sup> To the contrary, news and issue responsive public affairs programming have become prime targets for budget cuts and contributed to the demise of local news operations,

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<sup>11</sup>"The significance of ownership from the standpoint of 'the widest possible dissemination of information' lies in the fact that ownership carries with it the power to select, to edit, and to choose the method, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest." *Second Report and Order*, 50 FCC2d at 1050.

<sup>12</sup>See Comments of Black Citizens for A Fair Media, at pages 6, 8 - 19, filed May 17, 1995 in MM Docket Nos. 91-221 and 87-8.

especially in radio.<sup>13</sup>

It is impossible to overstate the importance of establishing and maintaining content-neutral prophylactic ownership policies. After-the-fact judgments of the impact of concentrated ownership control are necessarily subjective, and thus become enmeshed in impossible First Amendment dilemmas. This is not to say that there is no evidence of actual and potential impact of mass media conglomeration.<sup>14</sup> One paradigmatic instance occurred in the wake of the Walt Disney Company-CapitalCities/ABC merger. In November 1996, the Chinese government threatened to deny Disney access to its market because of the company's announced plans to distribute a film about the Dalai Lama. While Disney trumpeted its willingness to resist Chinese pressure over distribution of the movie, the fact is that the executive responsible for the decision, Michael Ovitz, was sacked shortly thereafter, in part because of that decision. Writing in the *Columbia Journalism Review*, journalist Neil Hickey notes that although Disney decided to distribute the film,

we may confidently predict that neither ABC, CBS, NBC, nor Fox - nor any

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<sup>13</sup>*Id.* at page 9, citing P. Aufderheide, *After the Fairness Doctrine: Controversial Broadcast Programming and the Public Interest*, 40 J. of Comm. 47, 51 (1990) (citing studies showing that deregulation has led to decreased news, public affairs, and community affairs programming). See also, a 1988-89 survey by RTNDA which concluded that deregulation influenced the decisions of radio stations to eliminate news programs. M. McKean and V. Stone, *Why Stations Don't Do News*, RTNDA Communicator, June 1991, at 22.

<sup>14</sup>See, e.g., Edward Fink, *The Journal of Media Economics*, Vol.8, No. 3, 1995, page 125, (reviewing John H. McManus, *Market-Driven Journalism: Let the Citizen Beware?* Thousand Oaks, CA: Sage, 1994) (arguing that increased concentration "has shifted journalism's goal to one of making constituents happy, and the consumers of news are only one of four constituencies, the others being investors, advertisers, and news sources." *Id.* at page 126.) See also, Alan Bash and David Lieberman, *Will Mergers Dilute News Coverage?*, *USA Today*, October 11, 1996; and R.H. Prisuta (1979), *Local TV News as an Oligopolistic Industry: A Pilot Study*, *Journal of Broadcasting*, 23, 61-68.

cable network connected with them - will ever broadcast a tough documentary on China's brutal treatment of Tibet or its ruthless suppression of the Tiananmen Square Democracy Movement or its sale of nuclear materials to rogue nations or its expected crackdown of democracy in Hong Kong when it assumes control there on July 1[, 1997].

Neil Hickey, *So Big: The Telecommunications Act At Year One*, Columbia Journalism Review, Jan/Feb 1997, page 25.

Hickey's prediction is borne out by NBC's recent behavior in a somewhat similar context:

NBC abjectly apologized to China after sportscaster Bob Costas in his on-air commentary at the Olympics referred to 'problems with human rights, property rights...and the threat posed to Taiwan,' as well as to the well-documented use by Chinese athletes of performance enhancing drugs. NBC parent GE, one needs to know, has huge investments in China (lighting, hospital equipment, plastics), and NBC operates a pair of satellite channels (NBC Asia and CNBC Asia) which aspire to serve the whole Chinese mainland, and GE has an agreement with China Telecommunications to build a data transmission network.

*Id.* at 25.

In the face of these powerful indications that concentrated ownership will harm diversity, the Commission nonetheless proposes to encourage creation of an industry composed of smaller numbers of larger companies. Thus, the underlying bases of the Commission's ownership proposals are incomplete, often inaccurate and overemphasize efficiency over diversity. It is necessary to revise the framework for analysis before reasoned policymaking can begin.

**I. THE COMMISSION SHOULD NOT MODIFY THE GRADE B CONTOUR OVERLAP RULE ABSENT COMPELLING EVIDENCE THAT IT WILL NOT RESULT IN A SIGNIFICANT DIMINUTION OF VIEWPOINT DIVERSITY.**

The Commission seeks comment on various proposals to narrow the geographic scope of the duopoly rule from its current Grade B contour overlap test. *Second FNOPR* at ¶¶10-28.